In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 242.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,

Petitioner,

vs.

OLGA ZDANOK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE
and
BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE CITY OF CLEVELAND, OHIO.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The Chamber of Commerce of the City of Cleveland, Ohio hereby respectfully moves for leave to file a brief *amicus curiae* in this case. The consent of counsel for the petitioner has been obtained. The consent of counsel for the respondents was requested but refused.

The Cleveland Chamber of Commerce is a corporation organized and existing under the laws of the State of Ohio for the special purpose of protecting and advancing the commercial interests of the City of Cleveland, Ohio. The Chamber numbers over 4,725 members, many of whom are engaged in commerce and operating under collective bargaining agreements containing provisions similar, if not identical, to those under consideration in this case. As an organization existing for the protection and advancement of the commercial interests of the City of Cleveland, the Chamber is also vitally interested in the effect the decision of the Court of Appeals will have on

the plant mobility and general development of industries in the Cleveland area.

In the Court of Appeals, the petitioner maintained that, since only laid-off employees were entitled to retention of seniority under the terms of the collective bargaining agreement involved, the individual respondents, whose employment had been terminated, had no grounds for asserting denial of their seniority rights. Since it is likely that the petitioner will present this theory of the case again in this Court, the Cleveland Chamber of Commerce is requesting leave to file a brief *amicus curiae* in which it will be shown that the decision of the Court of Appeals warrants the attention of this Court because of its application to laid-off as well as terminated employees.*

Respectfully submitted,

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* The petition draws into question the constitutionality of the Act of July 28, 1953, 67 Stat. 226, 28 U. S. C. § 171, and neither the United States nor any agency, officer or employee thereof is a party to this proceeding. As such, it is noted that 28 U. S. C. § 2403 may be applicable. Your *Amicus Curiae* is not aware that any court of the United States has, pursuant to 28 U. S. C. § 2403, certified to the Attorney General the fact that the constitutionality of the foregoing statute has been drawn into question in the present proceeding. Although the constitutionality of this statute is not presented in the brief *amicus curiae*, service of the motion for leave to file and brief *amicus curiae* has been made on the Solicitor General of the United States pursuant to Rule 33 (2) (b) of this Court.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE CITY OF CLEVELAND, OHIO.

This brief is being filed by the Chamber of Commerce of the City of Cleveland, Ohio as Amicus Curiae pursuant to Rule 42(1) of this Court in support of the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

The petition seeks review of a decision of the Court of Appeals holding, with one judge dissenting, that the seniority provisions of a collective bargaining agreement, entered into between the petitioner-employer and the bargaining representative of the individual respondents, were "vested rights" which endured and were enforceable in an action for damages after good-faith termination of the agreement and after the discontinuance of operations by the petitioner at the plant to which the agreement was, by its own terms, limited in application.

REASONS FOR GRANTING THE WRIT.

1. THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH AND SEVENTH CIRCUITS AND MARKS A DRASTIC DEPARTURE FROM PRINCIPLES ESTABLISHED BY SEVERAL DECISIONS OF THIS COURT.

In *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 457 (1957), this Court, recognizing that "it is not uncommon for federal courts to fashion federal law where federal rights are concerned," interpreted Section 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U. S. C. § 185, as authorizing the federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements.

Acting on the basis of this Court's mandate in *Textile Workers Union v. Lincoln Mills, supra,* the lower federal courts have held federal substantive law controlling in suits for the enforcement of collective bargaining agreements brought by individual employees as well as their certified bargaining representatives.[1] Moreover, as recently as the 1959 Term, this Court indicated that the presence of a union as a party was not essential to the applicability of federal substantive law in an action to enforce a bargaining agreement, when a third-party beneficiary action brought by the trustees of a welfare and retirement fund was held to be governed by principles of

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[1] "We would undercut the Act and defeat its policy if we read § 301 narrowly as only conferring jurisdiction over labor organizations." *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 456 (1957). See *e.g., Swift & Co. v. United Packing House Workers*, 177 F. Supp. 511, 513 (D. C. Colo. 1959); *New Bedford Defense Products Division v. Local 1113, Int'l Union, etc.*, 160 F. Supp. 103, 109 (D. C. Mass. 1958), *aff'd*, 258 F. 2d 522 (1st Cir. 1958); *Fay v. American Cystoscope Makers*, 98 F. Supp. 278, 281 (D. C. S. D. N. Y. 1951).

federal substantive law. *Lewis v. Benedict Coal Corp.*, 361 U. S. 459, 470 (1960).

The decision of the court below cannot be dismissed as a factual matter based solely on the particular terms of the agreement under consideration, for the court unequivocally, and with reference only to that clause of the agreement providing that employees retained seniority while laid-off from their employment, held that the individual respondents had acquired "vested rights" in their seniority which survived termination of the agreement and discontinuance of operations at the plant to which the agreement was limited in application.

This unprecedented decision of the Second Circuit stands in direct conflict with a decision of the Court of Appeals for the Seventh Circuit in *Local Lodge 2040, International Association of Machinists v. Servel*, 268 F. 2d 692 (7th Cir. 1959), *cert. den.*, 361 U. S. 884 (1960). There a group of individual employees, working under a bargaining agreement providing that laid-off employees would retain their seniority for periods of time ranging from one to two years, instituted an action for a declaratory judgment to the effect that the bargaining agreement and certain rights acquired thereunder were in full force and effect, despite their employer's discontinuance of operations and termination of the agreement. The employees maintained that, since they retained their seniority for a period of two years after layoff, this status gave each of them the vested right to maintain their group insurance, hospitalization insurance and to retire under the company pension plan if they reached the required age during this two-year period.[2] Rejecting the employees' contention

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[2] The respondents' claims here are identical with those asserted in *Servel* in every respect. In urging that they have been

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that their seniority rights survived termination of the agreement, the Seventh Circuit remarked (268 F. 2d at 698):

> "Contrary to appellants' contention, we find nothing in the agreement providing for a *permanent* layoff status to these employees or giving vested rights to seniority for two years following their layoff. Seniority rights depend upon an employer-employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence, and the right of seniority is not inconsistent with the right of an employer to discharge an employee." (Emphasis in original.)

In the court below, the respondents attempted to explain away the Seventh Circuit's decision in *Servel* on the ground that there the employer completely discontinued all operations; whereas the present petitioner had only closed its Elmhurst plant and transferred its operations to another state. This distinction, however, is no longer available to the respondents, for the Court of Appeals held that the respondents acquired "vested rights" in their seniority, and vested rights cannot be extinguished even by a complete cessation of operations. See *e.g., Vallejo v. American R. Co. of Porto Rico,* 188 F. 2d 513 (1st Cir. 1951). The conflict unwittingly created by the court below can only be attributed to an erroneous comparison of seniority rights with pension and retirement benefits, which by their very nature can take effect only upon ter-

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deprived of rights under the petitioner's pension plan, group insurance program and their union's welfare plan, the respondents did not rely on any provision of the agreements establishing the plans. Rather, they asserted that they had been deprived of rights under each of the plans by reason of the petitioner's alleged breach of the seniority provisions of the collective bargaining agreement. (Pet. A-16.)

mination of the employer-employee relationship and which, incidentally, are vested only by virtue of express provision in the agreement conferring such rights.[3]

The decision of the court below is also in conflict with that of the Fifth Circuit in *System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co.*, 119 F. 2d 509 (5th Cir. 1941), where a labor organization, suing as the representative of its individual members, brought action against an employer for a claimed denial of seniority rights when the employer failed to re-employ several workers furloughed prior to termination of a bargaining agreement. The agreement involved provided that seniority would govern all reductions in the work force, and that employees would be rehired in order of their seniority. The union contended that, when the work force was increased after termination of the agreement, all workers furloughed during the term of the agreement were entitled to be re-employed in the order of the seniority conferred upon them by the agreement. The Court of Appeals affirmed the District Court's dismissal of the complaint, holding that "collective bargaining agreements do not create a permanent status, give an indefinite tenure or extend rights created and arising under the contract beyond its life."

Although this Court has never had occasion to consider the precise issue involved in this case, it has observed

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[3] The same misconceptions underlie respondents' comparison of seniority rights with accrued vacation and severance pay, as was pointed out by Judge Palmieri in the District Court: "In view of the purpose of such vacation and severance pay provisions, it would be unreasonable to suppose that the parties did not expect their rights and obligations to be determined by reference to their prior understanding and practice. By contrast, the plaintiffs here seek damages for violation of their alleged right to transfer and continue an employment relationship involving future performance obligations on both sides." (Pet. A-11.) See *In re Wil-Low Cafeterias, Inc.*, 111 F. 2d 429, 432 (2d Cir. 1940).

that an employee can acquire "no inherent right to seniority in service," *Trailmobile Co. v. Whirls*, 331 U. S. 40, 53 (1947), and that, if rights are to persist beyond the term of the collective bargaining agreement, the agreement must so provide or be susceptible of such construction. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593, (1960). Moreover, in *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U. S. 521 (1949), this Court also indicated an awareness of the restraint courts must exercise in appraising the seniority provisions of collective bargaining agreements, when it remarked (337 U. S. at 526):

> "There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. *All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining.*" (Emphasis added.)

It is difficult to conceive of any more dogmatic and unrestrained application of the seniority principle than the holding of the court below that seniority is a "vested right" which survives termination in good faith of the agreement conferring such rights. It is equally difficult to ascertain any broader unit to which these vested rights could apply than one impliedly extended from Elmhurst, New York to Bethlehem, Pennsylvania.

Illustrative of the confusion spawned by the decision in this case is *Oddie v. Ross Gear & Tool Co., Inc.*, (No. 21350, D. C. S. D. Mich.), 130 Daily Lab. Rep. E-1 (July 7, 1961), where several employees instituted an action against their former employer for a declaratory judgment to the effect that seniority rights acquired under a collec-

tive bargaining agreement survived termination of the agreement and discontinuance of operations by the employer at its plant in Detroit, Michigan. The employer had terminated the agreement in good faith and moved its operations to Tennessee. The agreement forming the basis of the action was expressly limited in application to the employer's plants "located within the city limits of Detroit" and made no provision for retention of seniority during layoffs other than a statement that laid-off employees would be recalled to work in order of seniority. On the defendant-employer's motion for summary judgment, it was shown that, during the bargaining negotiations leading up to the execution of the terminated agreement, the union had failed in its demand for a provision extending recognition, seniority rights and other benefits under the contract to any new plants created by the employer regardless of their location. Disregarding this relevant history of negotiations and relying solely on the decision of the Court of Appeals in the present case, the District Court held that the employees had acquired "vested rights" in their seniority which extended beyond termination of the agreement and which applied to any plant of the defendant-employer "regardless of physical location."

Your *Amicus Curiae* submits that the decision of the court below is so out of harmony with the principles established by this Court and heretofore followed by the lower courts in fashioning the substantive law applicable to actions of this nature as to require clarification and correction by this Court.

2. THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL SUBSTANTIVE LAW INVOLVING THE ADMINISTRATION AND ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS WHICH, BECAUSE OF THEIR RECURRING NATURE, REQUIRE CONSIDERATION AND DECISION BY THIS COURT.

In *Ford Motor Co. v. Huffman,* 345 U. S. 330, 333 (1953), this Court granted certiorari "because of the widespread use of contractual provisions comparable to those before us and because of the general importance of the issue in relation to collective bargaining." As noted before, the bargaining agreement forming the basis of the respondents' action in the present case provided that laid-off employees would retain their seniority for periods ranging from two to three years. The court below accepted this provision for retention of seniority as conclusive evidence of the parties' intention to confer permanent layoff status on all employees laid off during the term of the agreement.

The tremendous impact of the decision of the Court of Appeals on the administration and enforcement of existing collective bargaining agreements can be measured to some extent by reference to the widespread use of contract provisions comparable to those contained in the present agreement. Contracts providing for retention of seniority rights by laid-off employees for periods ranging from one to three years are quite common in unionized industries, Harbison, *Seniority Policies and Procedures as Developed through Collective Bargaining* 57 (1941), and a trend towards acceptance of provisions for retention of seniority for an *indefinite* period was observed in a survey by the United States Department of Labor as early as 1940. See *Seniority Provisions in Union Agreements,* U. S. Dept. of Labor Bull. R. 1308 (1941).

In a more recent survey of over 1,347 major collective bargaining agreements,[4] the Department of Labor found that a uniform period of seniority retention applicable to all employees, regardless of differences in length of service, was provided in more than two-thirds of the agreements surveyed. Retention periods ranging from one to two

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[4] **Seniority Retention for Laid-Off Employees under Major Collective Bargaining Agreements, 1954-1955. U. S. Dept. of Labor Bull. No. 1209 (1957).**

Period of Seniority Retention*	Agreements	Workers (Thousands)
Total with layoff provisions	1,347	5,815.1
No reference to retention of seniority after layoff	372	1,469.2
With provisions for retention of seniority after layoff	975	4,345.9
Period of retention:		
Less than 1 year	67	182.8
1 year	197	716.8
More than 1, but less than 2 years	102	294.2
2 years	161	1,145.3
More than 2 years	83	261.6
Equal to employee's length of service	33	365.8
Equal to employee's length of service up to a maximum number of years	73	356.1
Related in some other ratio to employee's length of service	157	435.5
For specified period; then continued for additional period, provided employee requests extension	21	110.1
Equal to length of service or specified period, whichever is greater	20	242.1
Continues indefinitely	18	76.7
Continues indefinitely, provided employee takes prescribed action	31	108.8
Other	12	50.1

* Note—Because of rounding, sums of individual items do not necessarily equal totals.

years were specified in 460 agreements covering nearly half of the workers under agreements with retention clauses. One-year periods were most prominent, but agreements providing for retention of seniority over a two-year period after layoff covered nearly twice as many workers. *Analysis of Layoff, Recall and Work-Sharing Procedures in Union Contracts,* U. S. Dept. of Labor Bull. No. 1209 (1957). These figures serve to demonstrate that the rights arising from retention of seniority create recurring problems, and that the impact of the decision of the court below will be felt with great force in every unionized industry in the United States. As such, the problem warrants consideration and decision by this Court. *Ford Motor Co. v. Huffman, supra.*

The significance and scope of the decision of the Court of Appeals in this case is not limited to the basic determination that employees can acquire "vested rights" in their seniority. Of equal importance to the sound development of federal substantive law in this area is the court's holding concerning the extent to which these rights must be recognized and given effect by an employer under the pain of liability for violation of his collective bargaining agreement.

The agreement under which the respondents claim their seniority rights was entered into between the petitioner and the respondents' bargaining representative "for and on behalf" of the petitioner's plant facilities located at Elmhurst, New York. (Pet. A-13.) The petitioner's closing of the Elmhurst plant was concededly done in good faith, and there was no evidence of any prior history as to transfer of seniority on an inter-plant basis. (Pet. A-13.) Choosing to ignore these vital considerations, the court below dismissed that provision of the agreement limiting

its application to the Elmhurst plant as "nothing more than a reference to the existing situation," which was not intended to restrict the operative geographical scope of the agreement. (Pet. A-27.)

One disturbing repercussion of this aspect of the Court of Appeals' decision has already appeared in *Oddie v. Ross Gear & Tool Co., supra,* where, despite an affirmative showing by the employer that the agreement there involved was the result of negotiations in which the union failed to secure an enlargement of its operative geographical scope, the court held that the individual plaintiffs' seniority rights extended to any plant of the defendant-employer "regardless of physical location." The immediate response of the *Oddie* court to the decision of the court below marks only the beginning of a long line of decisions about to unfold and extend by implication the obligations of innumerable employers under existing collective bargaining agreements.

Prior to the decision of the Court of Appeals in this case, an employer was free to terminate a collective bargaining agreement upon discontinuance or relocation of the operations covered by the agreement, so long as such action was taken in good faith and not for the purpose of evading his obligations under the agreement. *Local Lodge 2040, Int'l Association of Machinists v. Servel, supra*; *System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co., supra.* See also, *Bonnie Lass Knitting Mills, Inc.,* 126 N. L. R. B. 1396 (1960); *Brown-McLaren Mfg. Co.,* 34 N. L. R. B. 984 (1941); *Matter of Klotz,* 13 N. L. R. B. 746 (1939). The decision of the court below, disturbing as it does this generally accepted pattern of federal substantive law, can only serve to cripple all forms of industrial mobility and seriously confuse the administration

and enforcement of the collective bargaining agreements by which most industries are governed.

The decision of the court below also creates serious problems in the administration of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. § 141. Soon after the petitioner commenced operations at its Bethlehem plant, the Bethlehem employees selected a bargaining agent different from that representing the respondents at the Elmhurst facilities with authority to bargain with respect to wages, hours and working conditions, including seniority. (Pet. 5.) Any attempt on the petitioner's part to engraft the Elmhurst seniority agreement on the Bethlehem operations could well have constituted an unfair labor practice as a refusal to bargain with the designated representatives of the Bethlehem employees in violation of Sections 7, 8(a)(1) and 8(a)(5) of the Act, 29 U. S. C. §§ 157, 158(a)(1), (5).

This intrusion by the court below into an area reserved to the jurisdiction of the National Labor Relations Board and governed by the requirements of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. § 141, further illustrates the necessity for consideration of this case by this Court. In *Textile Workers Union v. Lincoln Mills, supra,* this Court directed the lower federal courts to fashion a body of federal substantive law on the pattern of our national labor policy. Any decision which collides with the principal expression of that policy certainly warrants the attention of this Court.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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